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No. 74-1044

In The Supreme Court of The United States

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

AMICUS CURIAE BRIEF OF LIEUTENANT LAWRENCE CARTER, CAPTAIN RAYMOND M. McGUIRE AND CAPTAIN WILLIAM F. READY IN SUPPORT OF APPELLEE.

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready file this Brief as Amicus Curiae in Support of Appellee.

QUESTION PRESENTED

Whether Mass. Gen. Laws ch. 32, § 26(3)(a) mandating retirement of members of the Uniformed Branch of the Massachusetts State Police at age 50 is constitutional?

STATEMENT OF INTEREST OF AMICUS CURIAE

Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready are members of the Uniformed Branch of the Massachusetts State Police; each of them has served at least twenty years creditable service with the Uniformed Branch and has passed his fiftieth birthday, thereby becoming eligible for superannuation retirement under Mass. Gen. Laws ch. 32, § 26(3)(a), the statute challenged by Appellee in these proceedings.

The Massachusetts Board of Retirement sent each of these officers a form letter at least sixty days prior to his fiftieth birthday reminding him of the mandatory retirement of members of the Uniformed Branch at age 50 and providing him with information concerning optional voluntary retirement before reaching the mandatory age.

At the time of receipt of this letter, each officer had passed the re-enlistment physical examination performed annually upon all uniformed officers aged 40 or over and had been pronounced fit to perform all the duties required of members of the Uniformed Branch.

Lieutenant Carter and Captains McGuire and Ready individually sought and successfully obtained court orders restraining the Massachusetts Board of Retirement and the Department of the Attorney General from enforcing the

mandatory retirement statute, found unconstitutional by a three-judge panel of the United States District Court for the District of Massachusetts in *Murgia* v. *Massachusetts Board of Retirement*, 376 F. Supp. 753 (D. Mass. 1974).[1] As a result, each officer is continuing service under court order in the same capacity as that in which he served before reaching age 50; Captain McGuire and Lieutenant Carter are respectively Commander and Assistant Commander of Troop D, Middleborough; Captain Ready is Personnel and Recruitment Officer, Framingham.

The interest of Amicus Curiae in the mandatory retirement statute is clear. Enforcement of the statute will foreclose from these men the opportunity to continue their careers at a time when they have been pronounced fit to continue performance of all the duties required of uniformed officers and when they possess the experience and skill demanded of those occupying responsible command positions.

STATEMENT OF THE CASE AND JURISDICTION

Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready, as Amicus Curiae, hereby adopt the Statement of the Case of Appellee, as well as Appellee's Statement of Jurisdiction.

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[1] *Carter* v. *Commonwealth*, Civil No. 74-487 (Plymouth Sup. Ct., Oct., 1974); *McGuire* v. *Commonwealth*, Civil No. 1330 (Bristol Sup. Ct., March 21, 1975); *Ready* v. *Commonwealth*, Civil No. 758 (Bristol Sup. Ct., Dec. 5, 1974).

ARGUMENT

I. CLASSIFICATION BASED SOLELY ON THE SUSPECT CRITERION OF AGE AND AFFECTING THE FUNDAMENTAL RIGHT TO GAINFUL EMPLOYMENT MUST BE SUBJECT TO STRICT JUDICIAL SCRUTINY.

Classifications based solely upon age possess many characteristics common to classifications heretofore characterized as suspect by the Supreme Court. Like classifications which discriminate on the basis of race, classifications discriminating on the basis of age have a long and unfortunate history in the United States. In the Commonwealth of Massachusetts, for example, these classifications originated almost a century ago with the passage of a civilian retirement and pension plan for the City of Boston, Act of May 14, 1878, ch. 244, § 5 [1878] Mass. Acts and Resolves 201. Massachusetts has not acted alone in the area. The snowball effect of similar statutes throughout the United States has worked to significantly reduce the percentage of older workers on the labor force.[2] Today, as a result of the widespread acceptance of mandatory retirement, older workers face pervasive discriminiation in employment.[3]

Age, like race, illegitimacy and national origin, is an immutable characteristic determined solely by the accident of birth. Classification of individuals based on such characteristics would seem to violate, as it did in the case of classification of individuals on the basis of the legitimacy of their

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[2] Gordon, M. S., *The Older Worker and Retirement Policies,* 83 Mo. Law Rev. 577 (1969).

[3] *Too Old To Work: The Constitutionality of Mandatory Retirement Plans,* 44 S. Cal. L. Rev. 150 (1971).

births, "the basic concept of our system that legal burdens should bear some relationship to individual responsibility ...." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972).

Both Congress and the Massachusetts Legislature have recognized the inherently suspect nature of classifications based solely on age where individuals are between the ages of 40-65.[4] Each statute imposes a heavy burden on the employer, be it a private company or state agency, to justify any practice which discriminates against a covered employee on the basis of his age. The Court should not underestimate the significance of this legislatively-imposed burden of proof when scrutinizing other acts of the Legislature and, as it were, putting the State to its burden of proof. Cf. *Frontiero* v. *Richardson,* 411 U.S. 677, 687-688 (1972); *Oregon* v. *Mitchell,* 400 U.S. 112, 240, 248-249 (1970) (opinion of Brennan, White, and Marshall, J.J.); *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-649 (1966).

Where the aged-based classification burdens the exercise of a right as fundamental to the individual as the right to gainful employment, strict judicial scrutiny is particularly appropriate.

The effects of mandatory retirement to both the individual and the society are staggering. In the case of the Appellee, he is forced to adjust to living on approximately one-half his former income at a time when the financial demands placed upon him as family wage-earner are at their peak. Lieutenant Carter and Captains McGuire and Ready would suffer the same fate if the statute is upheld.

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[4] Age Discrimination in Employment Act, *as amended* 29 U.S.C. §§ 621-634 (1974); Mass. Gen. Laws ch. 151 B, *as amended* (1972).

At the same time, the Commonwealth incurs the expense of paying out the Appellee's pension and paying his replacement while losing the services of a capable and experienced leader. The cost to the Commonwealth of the age 50 mandatory retirement of uniformed officers is high.[5]

The fundamental nature of the right to gainful employment has long been recognized by the Court. *Dent* v. *West Virginia,* 179 U.S. 114 (1888); *Truax* v. *Raich,* 239 U.S. 33 (1915); *Meyer* v. *Nebraska,* 268 U.S. 390 (1923). The Court in *Meyer* v. *Nebraska* placed this right in the same context with the fundamental rights to freedom of religion and privacy.

> While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. (emphasis supplied) *Id.* at 399.

In reviewing legislative classifications which burden the

[5] It has been estimated that an increase in the mandatory retirement age from 50 to 55 would result in a $120,000 saving the first year, with a total saving of $1,185,000 after five years. McLaughlin, Richard E., Plan for Reorganization of the Executive Office of Public Safety (hereinafter Plan for Reorganization), at 3 (Jan. 18, 1973).

exercise of fundamental rights or which create suspect classifications the Court has applied a strict standard of review. *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). Under this test, such classifications, unless shown to be necessary to promote a compelling governmental interest, are unconstitutional. *Shapiro* v. *Thompson, supra* at 634.

When measured against this standard, the mandatory retirement statute fails to pass muster.

The Appellants assert two objectives of the mandatory retirement statute: the maintenance of an effective governmental service, and the provision of material support for the individual retiring worker. Brief for Appellant at 16. While Amicus Curiae recognizes these as worthy goals, it submits that neither articulated purpose can be called compelling. Further, it is clear that mandatory retirement of members of the Uniformed Branch of the State Police is not necessary to promote these governmental interests. Where a uniformed officer has been pronounced fit to perform all of the duties required of him, how can his mandatory retirement be said to promote the effectiveness of the State Police? Where mandatory retirement forces an individual to live on approximately half his previous income at a time when he is capable of performing his job and earning a full salary, how can his mandatory retirement be said to provide for his material support? Accordingly, the Court should hold that the Massachusetts retirement statute for its uniformed State Police officers is not necessary to promote a compelling governmental interest.

II. THE MASSACHUSETTS RETIREMENT STATUTE CREATES AN IRREBUTTABLE PRESUMPTION OF UNFITNESS OF UNIFORMED OFFICERS AGED 50 IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Commonwealth has the undeniable right to refuse uniformed officers re-enlistment if they fail to meet the qualifications set out for members of the Uniformed Branch. However, the Commonwealth cannot, consistent with due process, refuse re-enlistment to all uniformed officers at age 50 on the basis of a statutory presumption that the officers become unfit at that age.

The Due Process Clause of the Fourteenth Amendment limits the power of states to terminate an entitlement, whether that entitlement is determined a "right" or a "privilege." *Goldberg* v. *Kelly*, 397 U.S. 354 (1970). Where law, rules or regulations establish in an employee something beyond a mere expectancy in the continuation of his employment, his "right" to retain that employment is a "property right" protected by the Due Process Clause. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Members of the Uniformed Branch of the Massachusetts State Police have such a property right in their jobs created by statute. Mass. Gen. Laws ch. 22, § 9A. The Appellee's substantial interest in retaining his employment has already been recognized. *Murgia* v. *Massachustts Board of Retirement*, at 754.

The Commonwealth, on the other hand, can point to no such substantial interest in retiring members of the Uniformed Branch at age 50 without an individualized determination of fitness, the two objectives advanced by Appellant in support of the mandatory retirement statute notwithstanding. In fact, the retirement statute lacks a rational basis in furthering *any* substantial state interest. *Id.* at 754.

This lack of rationality is clear when one studies the functioning of the system. Under State Police Regulations, each member of the Uniformed Branch is given a re-enlistment physical examination annually from age 40 on. (A. 146). Re-enlistment is contingent upon passing this examination. As a result of the testing of each officer annually as he approaches age 50 and the retirement of those failing to pass the physical examination, *all* those officers still with the State Police at age 50 are fit to perform all of the duties required of them, with the exception of a few individuals serving on disability waivers.[6] In view of this, how can the mandatory retirement of all officers at age 50 be said to rationally relate to providing a more effective State Police force?

The presumption of unfitness upon which the retirement statute is based is thus clearly not necessarily or universally true and is therefore violative of the Due Process Clause. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

The Commonwealth is put to no additional burden by the requirement of individualized determinations of fitness for those aged 50 in place of the across-the-board determination of unfitness provided by the statute, since each uniformed

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[6] Rules and Regulations of the Government of Massachusetts State Police, rule 7.4, authorizes the Commissioner of Public Safety to waive any physical or mental defect. (A. 138).

At the present time there are approximately 10-12 members of the Uniformed Branch serving under disability waivers. (A. 160)

officer is tested annually for physical defects under the present system. Rather than retire all officers at age 50, the Commonwealth can treat officers aged 50 as it now treats all other uniformed officers, retiring those officers unable to pass the re-enlistment physical examination.

III. THE MASSACHUSETTS MANDATORY RETIREMENT STATUTE LACKS A RATIONAL BASIS IN FURTHERING THE ARTICULATED STATE PURPOSES.

Where the strict standard of review is inapplicable to a case, the constitutionality of a legislative classification under the Equal Protection Clause is determined by consideration of whether the statute "rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973); *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1972).

Each time the legislature draws a line some individuals who might well have been included are left out; this is not objectionable under the Equal Protection Clause. *See Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). However, in order to meet the minimum test of rationality required of statutory classifications there must be a general relationship between the statute and the achievement of a legitimate state purpose. *San Antonio Independent School District* v. *Rodriguez, supra; McGowan* v. *Maryland, supra.*

Amicus Curiae does not argue that mandatory retirement laws in general are irrational or that provision of support to retired state employees through a pension scheme is irrational; Amicus Curiae only argues that mandatory retirement of uniformed officers of the Massachusetts State Police at age 50 is an irrational means of promoting or furthering these articulated state objectives.

The Commonwealth principally relies on its assertion that mandatory retirement at age 50 promotes the effectiveness of the State Police, effectiveness in the sense of physical ability and vigor. Brief for Appellant at 46. Amicus Curiae readily admits, as did the district court, that there is a general relationship between advancing age and decreasing physical ability. 376 F. Supp. at 755. This, however, is irrelevant to a determination of the rationality of the retirement statute, since the achievement of an effective state police force is not based on pure physical ability or on optimum physical capacity. The Commonwealth itself has determined the relevant physical parameters for purposes of the maintenance of an effective state police force by promulgating physical and medical standards for enlistment and re-enlistment. It is within these parameters that the rationality of the mandatory retirement statute must be determined. It is here that the total irrationality of the statute becomes clear.

State Police Regulations require each applicant for a position with the Uniformed Branch and each uniformed officer making a re-enlistment application to pass a physical examination. From the time a uniformed officer reaches age 40 he is subject to this examination annually, and is given additional tests as well.[7] Failure to pass this physical

[7] In addition to the tests usually included as part of the re-enlistment examination, those uniformed officers aged 40 and over are given an electrocardiogram and a test for gastrointestinal bleeding. (A. 148).

examination will result in an applicant's rejection or in the retirement of an active officer, unless he can obtain a disability waiver. By this process of selection only the fit survive. Therefore, with the exception of those now serving on disability waivers, those uniformed officers still active at age 50 are all fit to perform the duties of members of the Uniformed Branch, as fitness has been defined by the Commonwealth. *All* officers required to retire by the mandatory retirement statute have been examined within the twelve months prior thereto and pronounced fit.

Rather than serving to eliminate unfit men from the ranks of the State Police, the retirement statute deprives the State Police of the services of men continually found fit to perform, who have maturity which can only be gained through years of experience. It thus takes from the State Police the services of its most select and experienced group of officers. This is simply not rational in light of the articulated objective of the statute.

The statute is no more rationally related to the achievement of its second articulated objective: the provision of material support for the individual retiring worker. Brief for Appellant at 16. The operation of the statute forces uniformed officers into retirement at a set age; it in no way provides for their material support. An increase in the retirement age of uniformed State Police would not upset a complex retirement scheme. Instead, it would save the Commonwealth money[8] and allow individual officers to work additional years at full salary while building their retirement benefits with increased years of service.

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[8] McLaughlin, Richard E., Plan for Reorganization, supra.

CONCLUSION

For the reasons stated above, the order of the district court should be affirmed.

Respectfully submitted,

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